STATE OF MICHIGAN
IN THE SUPREME COURT
ON APPEAL FROM THE CIRCUIT COURT FOR THE COUNTY OF SAGINAW

KIRT BIERLEIN, Conservator for
SAMANTHA C. BIERLEIN, a minor,
and NORMA R. BIERLEIN, as Next Friend
of SAMANTHA C. BIERLEIN, a Minor,

Plaintiffs/Appellants,

v

Michigan Supreme Court Docket No. 128913
Lower Court Case No. 96-013292-NI

MARK SCHNEIDER and MARY
SCHNEIDER, Jointly and Severally,

Defendants/Appellees.
_____/

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128913
reply

PLAINTIFF'S REPLY BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

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ARGUMENT

THE ISSUE RAISED BY THE PLAINTIFF IN HIS APPLICATION FOR LEAVE TO APPEAL IS NOT BARRED BY THE DOCTRINE OF THE LAW OF THE CASE.

In their brief opposing plaintiff's application for leave to appeal, the Defendants claim that the issue involved has already been determined in a prior proceeding and is therefore barred from review under the doctrine of the law of the case. A review of the proceedings, however, makes clear that the law of the case doctrine does not act as a bar in this case.

The law of the case doctrine applies "if an appellate court has passed on a legal question" in a prior proceeding and has remanded the case for further proceedings. C.A.F. Investment Co. v Township of Saginaw, 410 Mich. 428, 302 N.W. 2d 164 (1981). As noted by this Court in Locricchio v Evening News Ass'n, 438 Mich. 84, 109, 476 N.W. 2d 112 (1991), the doctrine exists primarily "to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit."

This Court has ruled, however, that the doctrine only applies "to issues actually decided, either implicitly or explicitly, in the prior appeal." Grievance Administrator v Lopatin, 462 Mich. 235, 260, 612 N.W. 2d 120 (2000).

In the **Bierlein I** appeal, the issue before the Michigan Court of Appeals was whether the Circuit Court could reopen the proceedings in order to determine whether the July 28, 1997 settlement terms met the requirements for settlement of the minor child's claim. Circuit Judge Fred L. Borchard determined that the proceedings could be reopened under MCR 2.612. The Circuit Court did not rule on the Plaintiff's alternate request for relief, which was to enforce the settlement and to require payment of the settlement amount to the minor child's recently appointed conservator.

Thus, the issue presented to the Michigan Court of Appeals in **Bierlein I** was whether the Circuit Court had erred in determining that the settlement proceedings could be reopened, and not whether the Defendants could be required to pay the settlement to the conservator as required under MCR 2.420.

The Grant Of Leave To Appeal in **Beirlein I** (Defendant's Exhibit V) states as follows:

> "In addition to the issues raised in the application, the parties are directed to address what relief, if any, is appropriate in this matter"

This second question was briefed, but was never addressed by the Michigan Court of Appeals. Having determined that the Circuit Court had erred in reopening the settlement proceedings under MCR 2.612, the issue of what relief, if any, was appropriate was never reached.

If the Michigan Court of Appeals in **Bierlein I** had affirmed the Circuit Court's decision to reopen the settlement proceedings, then the issue of the appropriate relief would have been addressed, as directed by the court. That, however, did not happen.

Defendant relies upon the following from the Court of Appeals decision in **Bierlein I**:

> "[D]efendants' rights would be detrimentally affected if the original satisfaction is set aside since they relied on the court approved settlement for almost five years and have paid $55,000 to Samantha's next friend and attorney based on that court approval." (Defendant's Exhibit Q, at page 3.)

While this analysis by the Court of Appeals may be correct in the context of a decision under MCR 2.612, it should have no application in the context of the Plaintiff's present motion which is to require payment of the settlement to the conservator under MCR 2.420. To hold otherwise would effectively strip the protection which has been built into the court rules and Michigan statutes for minor children's settlements.

Because the Plaintiff's motion to enforce payment of the settlement to the conservator was never decided by the Circuit Court in **Bierlein I**, it could not have been addressed by the Court of Appeals in **Bierlien I**. The question, therefore, was not barred by the doctrine of the case and is properly before this Court on Plaintiff's Application for Leave to Appeal.

Plaintiff's claim is also distinguishable from the case relied upon by Defendants – Miller v. Molette & East Side Cab, Inc., 2003 WL 21186587 (Mich. Ct. of App. 2003) (Exhibit U Defendant's Brief). In Miller, Plaintiff sought to set aside a settlement and satisfaction of the settlement after she attained age 18 and discovered that "no money existed" from the settlement funds. The Court of Appeals noted in denying the Plaintiff's relief that:

> "Plaintiff never claimed that the proceeds of the first payment were not used for her benefit. She never asserted that Moore, her grandmother and guardian, absconded the funds. Plaintiff merely asserted that "no money existed" when she attained the age of majority." Miller at 6.

Based on the above, the Court of Appeals viewed Plaintiff's action as an attempt to obtain a windfall and in effect, to "double dip" defendants.

Unlike Miller, Plaintiff in the present case received nothing from the settlement. It is undisputed that the entire settlement proceeds found their way to the Plaintiff's attorney's account and were stolen by that attorney. The attorney is now in prison, and an action against the attorney for recovery of funds would be futile.

It is submitted that under the circumstances of this case, the Court of Appeals rationale as noted in Miller does not fit. If MCR 2.420 is to be a meaningful deterrent for litigants and attorneys who are charged with protecting the interests of a minor child, then all parties and their counsel, together with the Circuit Judge, must be expected to adhere to its strict requirements.

RELIEF

Plaintiff requests that this court grant the application for leave to appeal from the lower court's order of November 15, 2004, limited to consideration of the proper application of MCR 2.420.

Respectfully submitted,

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